18

Office - Supreme Court, U. S.
FILED
AUG 21 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 122

MARTIN O. WEISBROD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

Reply Brief

PHILIP B. KURLAND
JOHN PAUL STEVENS
MARTIN O. WEISBROD
Counsel for Petitioner

ROTHSCHILD, STEVENS & BARRY
120 S. La Salle Street
Chicago, Illinois
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 122

MARTIN O. WEISBROD, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

May it Please the Court:

Respondent rests on the contention that the escape clause should be construed as though it read as follows:

> "The Government also reserves the right to withdraw from sale any property prior to the removal thereof without incurring any liability, *provided that the withdrawal is for the purpose of providing for the intervening needs of other agencies, of the armed forces, or of sales to veterans,* except to refund to the purchaser any amount, paid with respect to such property." (R. 6; Respondent's Br. 7)[1]

[1] The italicized insertion, except for the first few words, is taken verbatim from Respondent's brief.

There are compelling reasons for rejecting this contention.

1. The simple language of the escape clause does not remotely suggest that the italicized proviso should be interpolated into the contract.

2. In cases in which the Government was defending its right to invoke the escape clause, the Court of Claims was persuaded—presumably by Government counsel—that the clause was not limited to the three purposes identified here. In *Silverton* v. *United States*, 118 Ct. Cls. 232 (1951), Silverton, the plaintiff, unsuccessfully contended that the escape clause should be restricted by its purposes. In holding for the Government, the Court said (at p. 246):

> "It is true that the general counsel for the agency in explaining why these escape clauses were written into the contract gave three reasons why he regarded such reservations as desirable. These three reasons are set out in finding 6[2]. However, these reasons were not written into the contract, the terms of which are specific, concise, and do not require the giving of any reason so long as the facts of the case bring them within the terms of the exception—namely, the escape clauses."

3. The interpretation of the escape clause which is offered to this Court by respondent does not appear to have been communicated to the officials responsible for the practical construction of the contract. Respondent has cited no regulation, and petitioner has found none, delineating a policy of withdrawing goods from sale for three reasons and no others. In other litigation, the Government has successfully defended a withdrawal of goods from sale to the plaintiff in order to sell them to persons who were neither "other agencies," "armed forces," nor "veterans."

---

[2] The reference to "three reasons" is an interesting coincidence since they are not the same as the three purposes referred to by respondent in the instant case.

Schneiderman v. *United States*, 117 Ct. Cls. 715, 93 F. Supp. 626 (1950). A private party to one of these standard contracts would indeed have a difficult time persuading a government contracting official that the right of withdrawal was as limited as respondent now contends.

4. No explanation is given for the most unusual assumption that the clause was designed to effectuate only three of the twenty-odd purposes stated in the Surplus Property Act of 1944, 58 Stat. 765, as amended in 1946, 60 Stat. 168. (See Respondent's Br. pp. 12-14). Nothing in the contract identifies these three purposes as the sole grounds for withdrawal, and there is nothing in the statute which makes it appropriate to limit the broad language of the escape clause to three purposes and to exclude all others.[3]

It is interesting to note that respondent has made a guarded concession that a right of withdrawal for more than three reasons might render the contract invalid (Br. 7 n. 3) In view of this concession, respondent could not have argued that the clause was intended to effectuate all of the purposes of the Act. Nevertheless, the selection of only three such purposes is a rather artificial compromise between two dangerous alternatives. For, if respondent had relied squarely on either the language of the escape clause or the purposes of the legislation, its argument would have been as transparent as its alleged obligation.

---

[3] The particular language of the statute upon which respondent relies is certainly not persuasive. Two of the three sections, 12(a) and 16(a), did not appear in the Act in the form quoted in respondent's brief until more than a year after petitioner signed the "Bid and Contract Form" here involved. In their original form these sections were clearly ineffective in the absence of specific enabling regulation. See 9 F.R. 13239. The third section, § 6, as well as the other two prior to the 1946 amendments, refers to activities and duties of the War Surplus Board, whereas the record indicates that the escape clause was drafted by the Treasury Department (R. 6) and used by the Department of Commerce in its forms (R. 7).

CONCLUSION.

The Government does not dispute petitioner's view that the question presented is of general importance. Since it was erroneously decided by the Court of Appeals, this Court is urged to grant certiorari.

Respectfully submitted,

PHILIP B. KURLAND,
JOHN PAUL STEVENS,
MARTIN O. WEISBROD,
Counsel for Petitioner.

ROTHSCHILD, STEVENS & BARRY,
Of Counsel.

Office - Supreme Court, U
FILED
OCT 23 1953
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 122

MARTIN O. WEISBROD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

PETITION FOR REHEARING.

MARTIN O. WEISBROD,
Petitioner, *pro se.*

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 122

MARTIN O. WEISBROD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

PETITION FOR RE-HEARING.

May it Please the Court:

Denial was entered October 12, 1953. It may be apparent from the record that the Government's claim for a few hundred dollars has been contested by petitioner as a matter of principle. And, having practiced law for more than twenty-six years, he knows the odds against the allowance of this petition for rehearing. Yet, while he still has this expiring right to defend a classic rule of law, a veritable cornerstone of Anglo-Saxon civilization, it is his duty to do so.

I.

The necessity of consideration as a foundation of a commercial contract has been directly undermined, for the first time, by the decision of the lower court in this case. No amount of legal prestidigitation can alter the solid rock of petitioner's position:

(a) A contract must have consideration in order to be enforceable, and

(b) This rule applies to commercial contracts made by the Government.

From the very inception of this litigation, petitioner has earnestly, though naively, attempted to have the Courts of the United States uphold the traditional sanctity of private contracts. If this petition for rehearing fails to accomplish that purpose, his conscience is clear.

II.

Petitioner could have no cause for complaint if the very excellent reasons for withdrawing goods from sale, which are set forth in the Government's brief, were set forth in the contract. The evil of the decision lies in exempting the Government from enforcement of the contract for arbitrary and undisclosed reasons, while enforcing it against a private citizen. A Pandora's box of evil is opened when petty officials of disposal agencies may exercise an *arbitrary* power of withdrawal. There is at present too much of a buzz-saw danger to the hands of a private citizen in his contacts with Federal officialdom. This case puts a seal of approval on the exercise of such human qualities as greed, favoritism and incompetence to which Governmental employees are just as prone as are private citizens. In the handling of surplus war materials, it is almost a matter of judicial notice and certainly of Congressional

Record that such officials should not be given arbitrary power to cancel the doctrine of mutuality of obligation.*

CONCLUSION.

The Chief Justice did not deliberate on the original petition for certiorari. Also, it is possible that the emphasis has been misplaced in the original petition. Perhaps it should have stated more forcibly that the seemingly innocent opinion of the lower court contains the seeds of a monstrosity which should not be allowed to multiply. The cloak of sovereignty should not be used as a cloak of immunity to arbitrary actions of government employees when engaged in commercial transactions. The volume of government business in our national economy is of vast importance. The distinction between sovereignty and business when the United States is a party to a contract must not be confused by a badly reasoned decision in the Circuit Court of Appeals. Until Congress has directly modified the necessity for consideration in Government contracts, that corner-stone of our laws should not be undermined.

Respectfully submitted,

MARTIN O. WEISBROD,
Petitioner pro se.

I, Martin O. Weisbrod, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....

Pro Se.

---

* Final Report of the Select Committee to Investigate Disposition of Surplus Property, 79th Congress, 2nd Session, Pursuant to H. Res. 385 (House Report No. 2738) Page 35;
Report of the Committee on Expenditures in the Executive Departments Pursuant to Senate Resolution 75 (80th Congress) Senate Report No. 1365, Pages 10, 11 and 12;
Quarterly Progress Report to Congress by War Assets Administration—4th Quarter, 1946, page 6;
Quarterly Progress Report to Congress by War Assets Administration—4th Quarter, 1947, Page 74;
Fulton Iron Co. v. Larson, 171 F. (2d) 994, 996.